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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

EDWARD EARL DILLINGHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals applied improper criteria in evaluating his claim that he was denied a speedy trial by the 33 1/2 month delay between his initial arrest and trial.

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of conspiracy to transport stolen motor vehicles in interstate commerce and of various substantive offenses, in violation of 18 U.S.C. 371, 2312 and 2313.[1/] He was sentenced to imprisonment for five years. The court of appeals affirmed on October 2, 1974 (sub nom. United States v. Palmer, 502 F.2d 1233) (Pet. App.). The petition for a writ of certiorari was not filed

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1/ The government dismissed the charges against five co-defendants; two co-defendants pleaded guilty to a single count of the indictment; the district court directed a judgment of acquittal in favor of one co-defendant; the jury acquitted two co-defendants; petitioner and five co-defendants were convicted (Pet. 2).

until June 26, 1975, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court.[2/]

1. The evidence at trial showed that petitioner was a key member of an automobile theft ring that operated in several southeastern states from October 1969 until April 1970. The members of the ring were responsible for the theft of sixteen cars during that period (Tr. 156-157). Petitioner was employed at the time as a salesman at a Ford dealership in Atlanta, Georgia, from which the first of the cars was stolen on October 25, 1969 (Tr. 53-55, 610). Petitioner's principal function in the conspiracy was to provide fraudulent title papers for the stolen cars, but he also solicited new members for the conspiracy and helped transport and sell several of the vehicles (e.g., 82, 90, 125, 128-130, 151-155, 778). During the course of the operation, petitioner split approximately $20,000 in profits with co-conspirator Robert Rece (Tr. 82). Rece testified for the government at trial and provided the principal testimony linking petitioner to the conspiracy. In addition to other evidence, petitioner was also implicated by the testimony of several witnesses who purchased stolen cars from him (e.g., Tr. 928, 999, 1079, 1153-1156).

2. On April 6, 1970, petitioner was arrested on a warrant charging a violation of the Dyer Act and, following his waiver of a preliminary hearing and the setting of bail, he was incarcerated. On May 28, 1970, he was released on a $1,500

2/ Petitioner has moved for leave to file his petition out of time and has stated, through counsel, that the untimeliness of the petition is principally due to confusion concerning counsel's appointment to represent petitioner in this Court. Petitioner has further stated that "at all times" he advised his counsel that he wished to file a petition for a writ of certiorari and that the untimeliness of the petition is therefore "without fault" on his part. We have no reason to doubt the truthfulness of these statements.

bond. On February 9, 1972, petitioner was indicted with fifteen other persons. He was arraigned on October 20, 1972,[3/] brought to trial on January 22, 1973, and found guilty by a jury on February 2, 1973 (Pet. App. 4).

Prior to trial, petitioner moved to dismiss the indictment on the ground that he had been denied a speedy trial. This motion was denied by the trial court without prejudice to its being later renewed. Following trial, petitioner moved for entry of a judgment of acquittal--contending again that the delay in bringing him to trial following his arrest had infringed his right to a speedy trial. After an evidentiary hearing, the district court denied petitioner's motion for a judgment of acquittal (Pet. 3-4).

In reviewing the substance of petitioner's contention that he was denied his right to a speedy trial, and ultimately rejecting it, the court of appeals considered separately the 22 month period following petitioner's initial arrest and preceding his indictment and the 11 1/2 month period following his indictment and preceding the commencement of his trial. With respect to the 22 month post-arrest/pre-indictment period, the court stated that its attention was appropriately "focused on 'actual prejudice'--and only peripherally on such factors as length of and reason for the delay" (Pet. App. 5). The court evaluated the 11 1/2 month post-indictment period "according to the ad hoc approach required by Barker v. Wingo, guided by the four basic factors therein identified * * *" (Pet. App. 10).

3/ The delay between indictment and arraignment was due to the fact that petitioner had left Georgia and moved to South Carolina without leaving a forwarding address. His whereabouts were not discovered until October 1972 (Pet. App. 10-11).

3. Petitioner now contends that the court of appeals erred in rejecting his speedy trial claim and that that error is attributable to the court's failure properly to evaluate the entire 33 1/2 month period following his initial arrest and preceding the commencement of his trial according to the criteria announced in Barker v. Wingo, 407 U.S. 514.

a. We agree that resolution of the merits of petitioner's speedy trial claim depends upon application of the Barker criteria to the entire period from his initial arrest to the commencement of his trial.

In United States v. Marion, 404 U.S. 307, 313, this Court held that "the Sixth Amendment speedy trial provision has no application until the putative defendant has in some way become an 'accused,' * * *." Since the appellees in Marion were neither arrested, charged nor otherwise subjected to formal restraint prior to indictment, this Court was not required in that case to specify the point at which a person becomes an "accused" for speedy trial purposes, beyond holding that the return of an indictment "transform[s] [persons] into 'accused' defendants who are subject to the speedy trial protections of the Sixth Amendment" (id. at 325). This Court's opinion in Marion appears to leave little doubt, however, that it believed that the policies that inform the right to a speedy trial reach beyond the indictment stage of criminal proceedings and that the right consequently attaches either at the point at which a person is arrested and held to answer on a criminal charge or when he is formally charged by indictment or information, whichever occurs earlier (id. at 320; emphasis supplied):

> To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty,

> whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloguy, and create anxiety in him, his family and his friends. * * * So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.

Although the focus of this Court's opinion in Barker v. Wingo, supra, was on prescribing the criteria by which claims of deprivation of the right to a speedy trial are to be judged, and no issue was presented of a possible distinction in the evaluation of post-arrest periods before and after indictment, that opinion further evidences this Court's view that the right attaches at the point that a person is arrested and held to answer on a criminal charge. In discussing the length of the pre-trial delay requiring scrutiny under the Sixth Amendment, for example, the relevant time period was referred to as "the length of delay between arrest and trial * * *" (407 U.S. at 533). Overall, the thrust of the opinion for the Court suggests that once a person has been "accused" of a criminal offense--whether by being arrested and held to answer on a criminal charge or by indictment or information--any subsequent claim by the person concerning his right to a speedy trial must be considered in light of all the criteria there announced. E.g., id. at 520; Rule 48(b), Fed. R. Crim. P.

Finally, petitioner's contention that the court of appeals should have evaluated the entire period following his arrest and preceding his trial under the Barker criteria appears to be supported by this Court's decision in Moore v. Arizona, 414 U.S. 25. The petitioner in Moore argued that the Arizona Supreme Court had misconstrued this Court's decisions in Dickey

v. Florida, 398 U.S. 30, and Barker in holding that a showing of prejudice to the defense at trial was essential to establish a federal speedy trial claim. This Court agreed, repeating the admonition appearing in Barker that none of the four factors there identified (length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant) is "'either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial'" (414 U.S. at 26; quoting from Barker v. Wingo, supra, 407 U.S. at 533). Although not explicitly stated in the opinion in Moore, the petition filed in that case (see file in No. 73-5002; Pet. 3) and the opinion of the Arizona Supreme Court (506 P.2d 242, 244) make it clear that the bulk of the delay about which the petitioner there complained had occurred prior to the filing of an information formally charging him.

The court of appeals recognized in the present case that "'post-arrest pre-indictment delay is within the scope of the speedy trial guarantee * * *'" (Pet. App. 5). But the court went on to hold that "'a substantial showing of actual prejudice is required to establish a Sixth Amendment violation in this situation'" and that, with respect to the period prior to indictment, factors such as length of and reason for the delay are entitled only to peripheral consideration (ibid.). The court did not explain in its opinion the rationale underlying its distinction between delays prior to and after indictment, in cases involving a prior arrest; neither has a rationale for the distinction been set forth in previous Fifth Circuit decisions involving similar circumstances (e.g., United States v. Zane, 489 F.2d 269; United States v. Smith, 487 F.2d 175;

see also United States v. Schools, 486 F.2d 557).[4/]

It is not clear to us that the difference in verbal formulation of the standard used by the court of appeals in this case and that called for by Barker is likely to have a significant substantive impact upon the manner in which any particular speedy trial claim is evaluated (and, indeed, as we indicate below, we believe the result in the instant case should be the same under either standard). However, we can perceive no pertinent distinction between pre-indictment and post-indictment delays that would, in light of the policies that inform the speedy trial requirement, justify the application of different standards. Once formal criminal charges have been brought by arrest and the filing of a criminal complaint, the institutional and personal interests that dictate prompt resolution of the charges would appear to be fully activated.[5/] As noted, moreover, we believe that this Court's decisions in Marion, Barker, and Moore require that the entire period following arrest and the filing of a criminal complaint and preceding trial be evaluated in light of the Barker criteria.[6/]

b. Nevertheless, we believe that petitioner's claim that he was denied a speedy trial is without merit. The delay

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4/ Other circuits that have been confronted with the issue involved in this case have applied the Barker criteria without distinguishing between post-arrest/pre-indictment delays and post-indictment/pre-trial delays. E.g., United States v. Macino, 486 F.2d 750 (C.A. 7); United States v. Cabral, 475 F.2d 715 (C.A. 1); Edmaiston v. Nail, 452 F.2d 494 (C.A. 6).

5/ Of course, if the complaint had been dismissed and petitioner had subsequently been indicted, the period between those two events, during which no charges were outstanding, would not be includable in the period of delay for purposes of the speedy trial analysis.

6/ This is not to say that, on the facts of any particular case, there might not be some reason for weighting one of the Barker factors differently because it preceded indictment. But we see no justification for a general rule applying a different standard in all cases.

between petitioner's initial arrest and his trial was 33 1/2 months. Approximately seven months of that period occurred after indictment and was attributable to the fact that petitioner could not be located because he had moved without leaving a forwarding address or advising his relatives of his whereabouts (Pet. App. 10). The remaining 26 months, for which petitioner was not responsible, was not inordinate given the complexity of the case (encompassing transactions in several states and involving ultimately 16 defendants and numerous charges). Petitioner failed, moreover, to establish that he had been prejudiced by the delay.[7/] The two witnesses brought forward by petitioner at the hearing on his motion for a judgment of acquittal did not support his allegation that his ability to defend himself had been impaired because of the delay between his arrest and trial; indeed, their testimony tended to support the contrary conclusion (Pet. App. 7-8). Petitioner also failed to establish "personal" prejudice. As noted by the court of appeals (Pet. App. 9):

> [T]he trial court's express finding that [petitioner's] uncorroborated testimony concerning * * * personal hardships was not credible causes us to take a skeptical view. [Petitioner] admitted an Army court martial and a recent conviction for larceny which, if known to prospective employers or business associates, would have hindered his ability to earn a living. Also, he testified that State charges growing out of the car theft ring contributed to his difficulty in holding a job. Thus, the pending Federal charges were merely cumulative to his otherwise bad record. We, therefore, conclude that any increased strain on this man's life which followed his arrest on these Federal charges does not rise to the level of substantial actual prejudice. (Original emphasis).

7/ Petitioner did not avail himself, during the period between arrest and indictment, of his remedy under Rule 48(b), Fed. R. Crim. P., to obtain dismissal of the complaint for unnecessary delay in presenting his case to the grand jury.

Since petitioner's claim that he was denied a speedy trial is without merit, we respectfully submit that the petition for a writ of certiorari should be denied. Since, however, the court of appeals appears to have articulated an incorrect standard of review, this Court may wish to grant the petition and remand the case to the court of appeals for further consideration.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1975.